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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of

Implementation of Sections 12 and 19
of the Cable Television Consumer
Protection and Competition Act of 1992

Development of Competition and
Diversity in Video Programming
Distribution and Carriage

MM Docket No. 92-265

COMMENTS OF THE MOTION PICTURE ASSOCIATION
OF AMERICA, INC.

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SUMMARY

The Motion Picture Association of America, Inc. ("MPAA") was a major proponent of Section 616 of the Cable Television Consumer Protection and Competition Act of 1992 (the "Act"). MPAA's members produce and/or distribute motion pictures and television programming for exhibition through a wide variety of outlets, including cable television systems and other multichannel video outlets. Therefore, MPAA is vitally interested in fostering an open and competitive marketplace for the programming produced and distributed by its member companies.

Congress enacted Section 616 because it concluded that due to increased horizontal and vertical concentration in the cable television industry, cable operators are positioned to coerce equity or exclusivity from vendors as conditions of access to their distribution facilities and to discriminate against programming services in which they do not have an ownership interest. Section 616 seeks to prevent coercive and discriminatory practices by prohibiting (1) coercion of financial interests or exclusive rights in programming as a condition of carriage and (2) discrimination in the terms and conditions of carriage against programmers unaffiliated with the cable operator. The Commission's task in this proceeding is to adopt and implement regulations that carry out these purposes.

Because it is impossible to define in advance every type of conduct that could constitute or reflect coercion, MPAA suggests that the Commission prohibit the proscribed conduct in generic terms and amplify this definition through illustrative examples in a series of notes appended to the rule. The Commission also can look to standard industry practices to determine what is reasonable. In addition, the scope of proscribed conduct will be defined through specific adjudications. Similarly, it is not necessary or appropriate for the Commission to attempt to develop an all-inclusive list of practices constituting discrimination. Rather, indicators drawn from industry experience can be used in resolving complaints based on the facts of a particular situation. MPAA recommends that the Commission establish criteria for a prima facie showing of discrimination and suggests in its Comments a number of specific criteria for this purpose.

The complaint procedures proposed for use in connection with the enforcement of Section 628 also appear appropriate for the expedited review required by Section 616. The same standard of support for allegations, however, should apply to both complaints and answers. As a practical matter, mandatory carriage is the essential remedy for most violations. The rules also should provide for the setting of terms and conditions of carriage by the Commission in appropriate cases. When carriage

is ordered as a remedy, it should be for a reasonable period on non-discriminatory terms until the parties notify the Commission that they have reached a voluntary and non-abusive agreement. In addition, the rules should require consideration of a complaint within 90 days to afford meaningful relief to programming vendors.

MPAA also supports the goals of Section 628 -- to encourage the development of competition to cable television systems by assuring that programming is available to alternative multichannel distributors. However, the Commission must recognize that not all exclusive programming contracts are contrary to the public interest. As long as exclusivity is not coerced, exclusive contracts can be a legitimate business practice within a competitive marketplace and can contribute to the growth of new program services.

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OF AMERICA, INC.

The Motion Picture Association of America, Inc.
("MPAA"), by its attorneys and pursuant to Section 1.415 of the
Commission's Rules, 47 C.F.R. § 1.415 (1991), submits these
comments in response to the Commission's Notice of Proposed
Rulemaking^{1/} in the above-referenced proceeding.

I. INTRODUCTION

MPAA represents seven leading United States producers
and distributors of motion pictures and television
programming.^{2/} The video programming produced by MPAA's members

^{1/} Notice of Proposed Rulemaking, 8 FCC Rcd 194 (1993)
("Notice").

^{2/} MPAA's member companies include Buena Vista Pictures
Distribution, Inc.; Sony Pictures Entertainment, Inc.; Metro-
Goldwyn-Mayer Inc.; Paramount Pictures Corporation; 20th Century
Fox Film Corporation; Universal Studios, Inc.; and Warner
Brothers, a division of Time Warner Entertainment Company, L.P.
("Time Warner"). Time Warner is also filing separate comments in
this proceeding.

is exhibited through multiple video outlets, including cable television systems and other multichannel video services.^{3/} Specifically, MPAA member companies license unaffiliated cable program services to exhibit the video programming they produce and/or distribute. In addition, some MPAA members have ownership interests in such services, including, for example, USA Network and The Disney Channel. As both licensors to and owners of cable program services, MPAA members have a vital interest in facilitating a robust, diversified, and competitive distribution marketplace with multiple outlets.

Section 616 of the Act was enacted to encourage competition among video program services by preventing cable operators and other multichannel video systems from unfairly extracting ownership interests in unaffiliated program services or discriminating against unaffiliated program services. Section 616 thus is intended to enhance the creation and viability of unaffiliated program services and thereby maximize the programming choices available to the American public.

The diversity and vitality of video programming available to the American public through cable television and other multichannel video systems can only be maintained if the Commission fosters, through its regulatory policies, vigorous

^{3/} Because MPAA's member companies are "engaged in the production, creation, or wholesale distribution of video programming for sale," they are "video programming vendors" within the meaning of the Cable Television Consumer Protection and Competition Act of 1992 (the "Act"). See Pub. L. No. 102-385, 106 Stat. 1960 (1992).

competition in an open marketplace among video program outlets. Moreover, as digital compression becomes a reality and the capacity of cable television and other video programming outlets increases, the availability of numerous and diverse sources of video programming will become even more important. Accordingly, the Commission's policies and rules should be formulated to encourage video programming vendors to produce and distribute the widest possible variety of video programming choices to the American public through cable and other multichannel operators. As the Congress and the Commission have recognized, open and vigorous competition among video programming services and video programming distributors is the best tool to stimulate the production and distribution of new video programming.

MPAA was a principal proponent of the enactment of Section 616, which prohibits (1) coercion of financial interests or exclusive rights in programming as conditions of its carriage, and (2) discrimination against programmers unaffiliated with a cable operator in the terms and conditions of carriage. MPAA therefore is vitally concerned with, and in these Comments seeks to facilitate, the Commission's effective implementation of Section 616 of the Act. Effective implementation of Section 616 depends, in the first instance, on a clear understanding of the core intent of the legislation. In these Comments, we review this intent briefly and then apply it to the specific questions raised in the Notice, suggesting approaches to them whenever possible. The Comments also briefly address the implementation

of Section 628, which seeks to ensure that access to satellite cable programming and satellite broadcast programming is not hindered through anticompetitive or unfair practices.

II. SECTION 616

A. Effective Implementation Requires Close Adherence to the Core Intent of Section 616

Pared to its essence, the intent of Section 616 is to ensure that no cable operator or other multichannel distributor can demand ownership interests or exclusive rights in programming services in exchange for carriage of such services or discriminate in the terms of carriage against programming services in which the operator has no ownership interest. Congress has found that cable operators in the vast majority of U.S. communities face no competition from other cable systems or from any other type of multichannel video provider.^{4/} Congress also has found that the cable television industry is significantly and increasingly characterized by horizontal concentration in the ownership of cable systems and by vertical integration -- common ownership of the suppliers of programming and the facilities which distribute such programming.^{5/} As a result, Congress concluded that cable operators are positioned to

^{4/} See Act at § 2(a)(2); see also S. Rep. No. 102-92, 102d Cong., 2nd Sess. 8-11 (1992), reprinted in 1992 U.S.C.C.A.N. 1133, 1141-1144 (a cable system serving a local community, with rare exceptions, enjoys a monopoly).

^{5/} See Act at § 2(a)(s); S. Rep. No. 102-92 at 25-26, 1992 U.S.C.C.A.N. at 1156-59.

coerce equity or exclusivity from vendors as conditions of access to the sole available distribution system and to discriminate anticompetitively in favor of the program services in which they own "a piece of the action."^{6/}

Whatever multiple and historic factors contributed to this increased horizontal and vertical concentration are immaterial to this proceeding and to the rules the Commission must produce. The statute is quite clear that coercive and discriminatory conduct is proscribed and that the Commission must implement the proscriptions in a manner that discourages the misconduct in the first place and effectively remedies it if and when it occurs. This deterrence and remedy are both critical elements of the rules to be adopted in this proceeding.^{7/} MPAA respectfully suggests that this perspective, if kept uppermost in mind, will simplify the task of crafting and enforcing rules and will assure that they fulfill their intended purposes.

^{6/} See Act at § 2(a)(s); S. Rep. No. 102-92 at 25-28, 1992 U.S.C.C.A.N. at 1159-62 (vertical integration gives the incentive and ability to favor affiliated programming services by providing more desirable channel positions or refusing to carry other programmers).

^{7/} In the words of the 1990 House Report, the intent is that "the Commission will weigh the public's interest in obtaining comparable programming from diverse sources against the commercial interests of the parties, acting, in effect, as a surrogate for the public." See H.R. Rep. No. 682, 101st Cong., 2d Sess., at 107 (1990).

B. Implementation Questions

1. Coercion of Financial Interests and Exclusive Rights

Paragraph 56 of the Notice acknowledges that the Act does not prohibit financial interests and exclusive rights altogether, but rather only the coerced granting of such rights to an operator as a prerequisite to carriage. A critical task for the Commission, then, is to craft rules that distinguish as clearly as possible between coerced and freely negotiated agreements on these points by identifying the types of conduct "constitut[ing] indicia of coercion." Notice, ¶ 56.

As a threshold matter, it is neither possible nor necessary to define in advance every type of conduct that could evidence coerced concessions. Section 616, however, does require the Commission to adopt rules "designed to prevent," as well as prohibit, the coerced granting of ownership or exclusivity rights. This result can be accomplished through generic language, perhaps amplified by illustrative examples, such as in a note or series of notes appended to the rule. This is sufficient, and all that is feasible, to put operators on notice of the types of activity that are proscribed.

Beyond that, Section 616 contemplates rules invoked by individual complaints and resolved through expedited adjudication. This approach is necessarily fact-specific and obviates the need to anticipate in advance the precise circumstances, steps, courses of dealing, and combinations of

these which might be raised case by case. Rulings on complaints filed will provide adequate guidance on the scope and nature of permissible conduct over and above the initial rules.

In addition, Section 616 does not require the Commission to "specify the particular conduct that is prohibited," in contrast to Section 628, which does so require. Undue focus on defining coercion in this proceeding is therefore misplaced and inconsistent with the intent to formulate the basic prohibitions now and to provide a mechanism for review of specific alleged violations brought to the Commission's attention on a case-by-case basis.

Within this basic framework for a rule addressing the potential for coercion of financial interests and exclusive rights, examples of the kinds of activity which may involve coercion are useful and can be provided from industry experience. Indicators suggested for use in resolving complaints based on the facts of a particular situation include:

a) Refusal to carry a service on terms and conditions equivalent to what is reasonable and standard in the industry for comparable programming. Industry-wide, thousands of carriage agreements have been entered into and provide a point of reference against which to evaluate particular conduct. Information about standard industry practices is available from trade publications, as well as from the parties to individual adjudications.

Deviation from standard terms and practices is not, of course, automatic evidence of coercion. But it will be easier for the complaining party to prove that there is no legitimate business rationale for the extraction of an ownership interest or exclusivity in relation to whether carriage is offered and on what terms, or whether the only basis for offering less favorable terms -- or denying carriage altogether -- is due to the operator's efforts to coerce ownership or exclusivity.

b) The dominance in the market of the distributor obtaining exclusivity or ownership. As recognized in the Senate Report,

exclusivity can be a legitimate business strategy where there is effective competition. Where there is no effective competition, however, exclusive arrangements may tend to establish a barrier to entry and inhibit the development of competition in the market. Thus, the dominance in the market of the distributor obtaining exclusivity should be considered in determining whether an exclusive arrangement amounts to a unreasonable refusal to deal.^{8/}

Absence of a comparable alternative distributor can be easily determined.

c) The pattern of conduct and course of dealing between the parties. For example, if an operator rejected carriage of a program service, but later agreed to carry it after ownership or exclusivity is offered as the only significant modification of the original vendor's proposal, an inference of coercion may be warranted.

^{8/} S. Rep. No. 102-92 at 28, 1992 U.S.C.C.A.N. at 1161.

d) The timing of agreement on financial interests or exclusivity. If carriage is agreed upon first, and agreement on a financial interest or exclusivity is reached sometime later, coercion is less likely than if carriage is refused until the prohibited requirements are accepted.

2. Discrimination Against Unaffiliated Programming Services

Section 616(a)(3) requires "provisions designed to prevent a . . . distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation . . . in the selection, terms or conditions for carriage . . ." (emphasis added). As with financial interests and ownership rights, it is neither necessary nor appropriate for the Commission to develop now an all-inclusive list of practices which constitute discrimination. It is the effect of a course of dealing or combination of circumstances that is the focus of the rule, and that effect cannot be defined generically in advance.

Discrimination against nonaffiliated services, however, does lend itself far more readily to identifying specific known practices that evidence prohibited behavior. This is because discrimination can be discerned by comparing the treatment of affiliated and unaffiliated programmers in a set of specific areas, a type of analysis not readily available regarding

coercion. On this basis, and as a result of experience in the industry, MPAA recommends that the Commission establish criteria for a prima facie showing of discrimination. MPAA recommends that the Commission consider the following criteria for this purpose:

a) Refusal to carry an unaffiliated service without reasonable business justification.

b) Significantly inferior channel positioning, or other type of inaccessibility to subscribers, as compared to competing affiliated comparable services added to the system during the same time frame.

c) Unwillingness, without a reasonable business justification, to engage in promotional support, cooperative advertising, or other similar activity performed for comparable affiliated services.

d) Willingness to sell subscriber lists and addresses and other data useful in promotional activity only to affiliated programmers.

e) Exclusion of mention of unaffiliated programming services in standard presentations to potential subscribers, when affiliated services are named.

f) Requirements that unaffiliated services waive rights not waived by any comparable affiliated or unaffiliated service.

g) Higher per subscriber monthly payments to affiliated services than to comparable unaffiliated services

without reasonable business justification.

h) Imposing more onerous technical quality standards or requirements on the unaffiliated service.

i) Refusal without a reasonable business justification to include a nonaffiliated service in comparable discount packages to those in which comparable affiliated services are offered to subscribers.

3. Review Procedures, Penalties, and Remedies

a. Review Procedures

The complaint procedures proposed for use with Section 628 (Notice, ¶¶ 38-41, 45, 47-48) appear to be generally appropriate to provide the expedited review which Section 616 requires. The same standard of support for allegations, however, should apply to both complaints and answers. If each factual allegation in a complaint must be specific and supported by affidavit or be dismissed, the same should be true of allegations in a response, particularly if no subsequent reply by the complainant is contemplated. General denials would not achieve expedited review. The Notice (¶ 40) proposes a far heavier threshold standard for complaints than responses. No justification is offered for this, nor is there any such justification, particularly in view of the provision requiring the imposition of penalties for the filing of frivolous complaints.

Regarding confidential treatment of carriage agreements (Notice, ¶ 58), availability of disputed agreements with redacted proprietary terms would tend to contribute to the body of

precedent concerning prohibited conduct, thereby promoting certainty, deterring violations and minimizing the incidence of unsuccessful complaints. These factors seem to outweigh the need for confidentiality of an entire contract, which could still be requested in appropriate cases pursuant to the existing procedures in the Commission's rules for requesting confidential treatment. See 47 C.F.R. § 0.459 (1991).

b. Penalties and Remedies

Section 616(a)(5) requires provision in the rules for "appropriate penalties and remedies for violations. . . , including carriage." The Notice (§ 58) proposes mandatory carriage and forfeitures and asks whether other remedies, such as Commission establishment of price, terms and conditions, should be available.

As a practical matter, mandatory carriage on non-discriminatory terms is the essential remedy for most violations. A program supplier denied carriage is out of business in the operator's market. Forfeitures may penalize the abuser (and may be appropriate for that reason), but afford no relief to the victim.

To be meaningful, the rules also must provide for the setting of terms and conditions of carriage, including but not limited to elimination of coerced financial interests and exclusive rights, and the compelled end to discrimination against the unaffiliated programming vendor. Carriage on coerced terms is not an adequate remedy. Commission rules therefore must

provide for carriage and for the establishment of reasonable terms and the removal of discriminatory terms in appropriate cases. (Where the parties agree on terms during the course of a complaint proceeding, there would of course be no need for the Commission to establish them.) When carriage is ordered, it should be for a reasonable period on non-discriminatory terms until the parties notify the Commission that they have reached a voluntary, non-abusive agreement. In addition, the rules should provide for expedited consideration of complaints (i.e., within 90 days) so that relief, where warranted, can be obtained promptly.

"Frivolous" complaints must be defined very narrowly if they are to give rise to penalties. In the first place, frivolous complaints are unlikely to be filed, in part because of the fear of retaliation. This, and the process itself, are more than enough to discourage complaints without merit. Here the intent of the statute is also key. Abusive conduct is not likely to be prevented, as Congress intends the FCC's rules to do, if complainants face unreasonable risks of sanctions for failing to prevail in an adjudication. The thrust of the statute calls for a narrow definition of frivolous complaints, or its intent will be subverted. A standard akin to the standard applied to motions to dismiss is appropriate: a complaint is frivolous only if it could not support grant of relief even if the truth of its allegations is presumed. If a complaint is found to be

frivolous, dismissal and a reasonable forfeiture would be an appropriate sanction.

III. SECTION 628

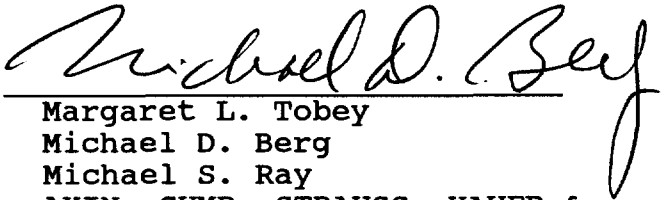
Section 628 has an important goal which MPAA supports and applauds: encouraging the development of competition to cable television systems by assuring that programming is available to alternative multichannel distributors. As Congress and the Notice recognize,^{9/} this goal must be pursued while preserving the maximum degree of legitimate business flexibility for programming vendors and buyers in the marketplace. In these opening Comments, MPAA limits its input concerning Section 628 to emphasizing that exclusive programming contracts that are not forced are indeed "a legitimate business practice common to a competitive marketplace" (Notice, ¶ 1) and can contribute to the growth of new program services (Notice, ¶ 36). Not all grants of exclusive rights are per se contrary to the public interest. But the public interest is never served by exclusivity that is

^{9/} See Act at § 2(b)(2); see also Notice, ¶ 12.

coerced as a condition of carriage and that discriminates against unaffiliated program services.

Respectfully submitted,

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